

St. John's Law Review

Volume 68
Number 3 *Volume 68, Summer 1994, Number 3*

Article 8

April 2012

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Adriana Yaryura

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Recommended Citation

Yaryura, Adriana (1994) "CPLR 4510: New York Legislature Adopts Statute Permitting Non-Disclosure of Confidential Communications Between Certified Rape Crisis Counselors and Rape Victims," *St. John's Law Review*: Vol. 68 : No. 3 , Article 8.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol68/iss3/8>

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CIVIL PRACTICE LAW AND RULES

CPLR 4510: New York Legislature adopts statute permitting non-disclosure of confidential communications between certified rape crisis counselors and rape victims

Testimony and the introduction of evidence promote society's interest in the truth-seeking function of our criminal justice system.¹ Nevertheless, exemptions² from compulsory disclosure are necessary to foster certain relationships.³ Many states have enacted statutes that establish privileges between rape crisis counselors and the victims who seek their help.⁴ Although protecting

¹ See *Dennis v. United States*, 384 U.S. 855, 870 (1966) ("[D]isclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."); see also *United States v. Nixon*, 418 U.S. 683, 707 (1974) (recognizing that absolute privileges may impede achievement of justice in criminal cases); *In re Pittsburgh Action Against Rape*, 428 A.2d 126, 131 (Pa. 1981) (stating truth-finding within criminal justice system must circumscribe absolute privilege), *superseded by statute*, 42 PA. CONS. STAT. § 5945.1 (Supp. 1992). See generally JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192, at 72-73 (1961) (noting that duty to testify stems from society's interest in maintaining effective legal system).

² See 2 TESTIMONIAL PRIVILEGES (Scott N. Stone & Robert K. Taylor eds., 2d ed. 1993) [hereinafter TESTIMONIAL PRIVILEGES]. Exemptions in the form of testimonial privileges include the following: attorney-client, accountant-client, spousal, clergyman-penitent, physician-patient, psychotherapist-patient, journalist, executive, and governmental privileges. *Id.*; see also WIGMORE, *supra* note 1, § 2192, at 73 (recognizing that privileges are exception to general duty to testify).

³ See 8 WIGMORE, *supra* note 1, § 2285, at 527. Professor Wigmore lists four conditions that are ordinarily required before a privilege will be recognized:

- 1) The communications must originate in a *confidence* with the expectation that they will not be disclosed.
- 2) This element of *confidentiality* must be essential to the full and satisfactory maintenance of the relation between the parties.
- 3) The *relation* must be one which, in the opinion of the community, ought to be sedulously *fostered*.
- 4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Id.; see also EDITH L. FISCH, FISCH ON NEW YORK EVIDENCE § 511, at 335 (2d ed. 1977) (arguing that although privileges exclude valuable evidence, social benefit of certain protected relationships outweighs harm of exclusion).

⁴ See, e.g., MASS. GEN. L. ch. 233, § 20J (Supp. 1994); UTAH CODE ANN. § 78-24-8(6) (1992). These states provide the rape victim-counselor relationship with an absolute privilege, even absent consent of the victim. Other states recognize a limited privilege for communications between rape victims and their counselors. See, e.g., ALASKA STAT. §§ 09.25.230, 12.45.049, 25.35.100-25.35.150 (Supp. 1993); CAL. EVID. CODE § 1035-1036.2 (West Supp. 1994); CONN. GEN. STAT. § 52-146k (1993); FLA. STAT. ch.

confidential communications between rape victims and their counselors is a valid state interest,⁵ critics are concerned that such a privilege may violate a criminal defendant's constitutional right to confront his accusers.⁶ Recently, the New York Legislature added section 4510 to the CPLR,⁷ which establishes a privilege

90.5035 (1994); ILL. ANN. STAT. ch. 110, para. 1-802.1 (Smith-Hurd Supp. 1992), amended by ILL. COMP. STAT. ANN. ch. 735 act 5, § 8-802.1 (Smith-Hurd Supp. 1995); MINN. STAT. § 595.02 (1993); 42 PA. CONS. STAT. § 5945.1 (Supp. 1992); WYO. STAT. § 1-12-116 (1988).

⁵ See Memorandum from Linda J. Valenti, Counsel, State of New York Executive Department, Division of Probation and Correctional Alternatives, to Elizabeth D. Moore, Counsel to Governor (July 27, 1993) (on file with author) (recommending passage of statute protecting communications between rape victims and their counselors). The agency noted that:

In view of the mental and physical injuries that are inflicted by perpetrators of sexual crimes, it is especially important that victims of these crimes are able to openly confide in the counselors who are helping them cope with these traumatic and often life-threatening experiences. The present lack of confidentiality results in many victims being unable to fully trust or confide in their counselors.

Id.; see also Michael Laurence, *Rape Victim-Crisis Counselor Communications: An Argument for an Absolute Privilege*, 17 U.C. DAVIS L. REV. 1213, 1223-25 (1984) (arguing that confidentiality is essential to effective counseling of rape victims); Carrie J. Scarneas, Comment, *Rape Victim-Rape Crisis Counselor Communications: A New Testimonial Privilege*, 86 DICK. L. REV. 539, 551 (1982) (arguing that rape crisis counselor privilege is necessary to aid victim's healing process).

⁶ For an excellent discussion of witness privilege claims versus defendant's right to confront his accusers, see Robert Weisberg, Note, *Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges*, 30 STAN. L. REV. 935 (1978). See Advisory Opinion to House of Representatives, 469 A.2d 1161, 1166 (R.I. 1983) (indicating that bill, similar to CPLR 4510, proposing absolute rape counselor-victim privilege was unconstitutional); *People v. Pena*, 127 Misc. 2d 1057, 1058, 487 N.Y.S.2d 935, 937 (Sup. Ct. Kings County 1985) (indicating that defendant's Sixth Amendment right to confront and cross-examine adverse witnesses may be violated by existence of rape crisis counselor privilege); see also Kathryn A. O'Leary, Comment, 21 SUFFOLK U. L. REV. 1222, 1224 (1987) (examining *Commonwealth v. Two Juveniles*, 397 Mass. 261 (1986), where court indicated that sufficient showing of need was required for defendant's *in camera* inspection of communications when statute creates absolute privilege); cf. *United States v. Nixon*, 418 U.S. 683, 710 (1974). In *Nixon*, the Court warned that privileges "are not lightly created nor expansively construed, for they are in derogation of the search for the truth." *Id.* (citation omitted).

⁷ CPLR § 4510 (McKinney Supp. 1994).

for confidential communications⁸ between rape crisis counselors⁹ and their clients.¹⁰

CPLR 4510 seeks to ensure that victims of sexual offenses receive needed counseling and assistance.¹¹ The privilege granted by this statute seeks to dispel the fear of disclosure that can make victims reluctant to confide in their counselors.¹² This privilege, however, may also obstruct the defendant's right to conduct an effective defense.¹³ By limiting the scope of cross-examination, the statute arguably violates the Confrontation Clause of the Sixth Amendment.¹⁴ Consequently, courts are obliged to weigh

⁸ CPLR 4510(b). The statute provides, in part, that the privilege encompasses communications disclosed by a client to a rape crisis counselor, and includes advice given during the counseling service. *Id.* Any person working for the same rape crisis program is also prohibited from disclosing such communication and no records made in the course of service can be disclosed. *Id.* The privilege, however, does not apply when: 1) the client authorizes disclosure; 2) the communication reveals the client's intent to commit a crime or other harmful act; and (3) the client waives the privilege by filing charges against the rape counselor of the program and the charges relate to the confidential communication. *Id.*

⁹ See CPLR 4510(a)(2) (McKinney 1994). A "rape crisis counselor" is defined as any person certified by an approved rape crisis program after completing a training program specified by the newly enacted § 206(15) of the Public Health Law. CPLR 4510(a)(3) (McKinney 1994). The person must be directed and supervised by an approved rape crisis program. *Id.*

¹⁰ CPLR 4510(a)(3) (McKinney 1994). A "client" is a person seeking or receiving counseling concerning any sexual offense, including sexual abuse, incest, or attempts to commit any of these offenses as defined in the Penal Law. CPLR 4510(a)(3) (McKinney 1994).

¹¹ Memorandum of Sen. Skelos, reprinted in [1993] N.Y. LEGIS ANN. 311 ("Confidentiality in rape crisis counseling is essential in creating trust, the cornerstone of any therapeutic relationship. Unless the victim is guaranteed confidentiality, he or she will be inhibited in discussion and unable to receive the full benefits of counseling.").

A well trained service provider who offers a sensitive response may go a long way towards enabling a victim to regain the sense of control essential for her or his well being. However, if the victim's first interaction with the service delivery system is negative that person is less likely to report the crime or cooperate in prosecution. It is . . . important to create a supportive and sensitive environment.

Id.

¹² See *supra* note 5 (discussing need for confidentiality and importance of victims openly confiding in counselors).

¹³ See *supra* note 6 (discussing conflict between privilege and defendant's right to confront accusers).

¹⁴ See U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . ." *Id.*; see *Pointer v. Texas*, 380 U.S. 400, 405 (1965) (Sixth Amendment right to confront witnesses is fundamental

the victim's privacy rights against the defendant's constitutional rights when interpreting CPLR 4510.¹⁵

The United States Supreme Court has recognized that the Confrontation Clause was designed, in part, to assist in ascertaining the truth.¹⁶ The rape crisis counselor privilege, however, may frustrate this goal by preventing disclosure of facts necessary to the proper operation of our adversary system of criminal justice.¹⁷ This privilege may impede a defense attorney's ability to test the perception, credibility,¹⁸ or bias¹⁹ of a witness, and prevent effec-

and includes right of cross-examination); Weisberg, *supra* note 6, at 958-76 (arguing importance of defendants' right to confront witnesses).

¹⁵ See *People v. Pena*, 127 Misc. 2d 1057, 1058, 1061, 487 N.Y.S.2d 935, 937, 939 (Sup. Ct. Kings County 1985) (balancing defendant's right to confront and cross-examine adverse witnesses against victim's interests in confidential counseling).

¹⁶ See *Davis v. Alaska*, 415 U.S. 308, 310, 315 (1974) (reversing conviction because defendant had been denied adequate opportunity to show alleged bias of crucial prosecution witness). When the State argued that disclosure would violate state law concerning confidentiality of juvenile delinquency records, the Court responded that "the right of confrontation is paramount to the State's policy of protecting a juvenile offender." *Id.* at 319; see also *United States v. Cronin*, 466 U.S. 648, 655-56 (1984) (finding that Sixth Amendment not only leads to truth, but also to "fairness in the adversary criminal process" (quoting *United States v. Morrison*, 949 U.S. 361, 364 (1981))); *Washington v. Texas*, 388 U.S. 14, 16, 23 (1967) (holding that Texas statute, which forbade calling of defendant's accomplice to testify, violated defendant's right to compulsory process).

For examples where the Supreme Court refused to broaden defendants' Sixth Amendment rights, see *California v. Green*, 399 U.S. 149 (1970) and *Dutton v. Evans*, 400 U.S. 74 (1970). In *Dutton*, Justice Harlan noted that the Confrontation Clause "is simply not well designed for taking into account the numerous factors that must be weighed in passing the appropriateness of rules of evidence." *Id.* at 96 (Harlan, J., concurring).

¹⁷ See *United States v. Robertson*, 859 F.2d 1376, 1378 (9th Cir. 1988) ("Privileges obstruct the search for truth."); *Dillenbeck v. Hess*, 73 N.Y.2d 278, 279, 536 N.E.2d 1126, 1133, 539 N.Y.S.2d 707, 714 (1989) (noting that privileges inherently present obstacles to discovery); see also *United States v. Nixon*, 418 U.S. 683, 713 (1974) (concluding that privileges based on generalized interest in confidentiality cannot prevail over fundamental demands of due process of law). The Court argued that:

The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system . . . depend[s] on full disclosure of all the facts . . .

Id. at 709. See generally Weisberg, *supra* note 6, at 947 (asserting that communication privileges are obstacles to fact-finding).

¹⁸ See *Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965); *Fountain v. United States*, 384 F.2d 624, 628 (5th Cir. 1967) ("[T]he question in each case must finally be whether defendant's inability to make the inquiry created a substantial danger of

tive cross-examination, which often reveals critical inconsistencies in testimony.²⁰ Furthermore, prohibiting discovery of a rape counselor's records deprives the cross-examiner of the opportunity to formulate an effective line of inquiry.²¹

The U.S. Supreme Court, in *Davis v. Alaska*,²² stressed the importance of balancing evidentiary privileges with a defendant's constitutional right to confront witnesses. In *Davis*, an Alaskan statute prevented the accused from offering records of the juvenile delinquency of a witness into evidence.²³ The defendant hoped to use this evidence to reveal the witness' bias and prejudice.²⁴ The trial court granted a protective order preventing the defendant from using the juvenile records during cross-examination.²⁵ The Alaska Supreme Court affirmed this order.²⁶ On appeal, the Supreme Court reversed, holding that the defendant's Sixth Amendment right to confront witnesses against him²⁷ outweighed the state's interest in protecting juvenile offenders.²⁸

prejudice by depriving him of the ability to test the truth of the witness's direct testimony."), *cert. denied*, 390 U.S. 1005 (1968).

¹⁹ See *United States v. Abel*, 469 U.S. 45, 50 (1984) (holding that Confrontation Clause requires giving defendant opportunity to demonstrate bias through cross-examination); *Davis*, 415 U.S. at 316 (noting that partiality of witness should be explored at trial).

²⁰ See, e.g., *In re Robert H.*, 509 A.2d 475, 479 (Conn. 1986) (noting respondents sought to introduce records from rape crisis center because of "yet other inconsistent statements" (internal quotation marks omitted)); *In re Pittsburgh Action Against Rape*, 428 A.2d 126, 132 (Pa. 1981) (holding that accused has right to determine existence of prior inconsistent statements of rape victim).

²¹ *Pennsylvania v. Ritchie*, 480 U.S. 39, 67 (1987) (Brennan, J., dissenting) ("Where denial of access is complete, counsel is in no position to formulate a line of inquiry potentially grounded on the material sought."); *United States v. Burr*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694). In *Burr*, Chief Justice Marshall observed that "if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents?" *Id.*

²² 415 U.S. 308 (1974).

²³ *Id.* at 311 nn.1-2.

²⁴ *Id.* at 311.

²⁵ *Id.*

²⁶ *Id.* at 314.

²⁷ 415 U.S. at 315 (citing U.S. CONST. amend. VI).

²⁸ 415 U.S. at 319. The Court observed that "[o]n the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness . . ." *Id.* at 318. The Court concluded that "the right of confrontation is paramount to the State's policy of protecting a juvenile offender." *Id.* at 319.

New York courts have not yet addressed the constitutionality of CPLR 4510. However, in *People v. Pena*,²⁹ the Supreme Court, Kings County, cautioned that a prospective rape crisis counselor privilege implicated defendants' constitutional rights.³⁰ In *Pena*, the defendant was charged with rape, sodomy, and sexual abuse.³¹ At trial, *Pena* moved for discovery of information from the rape crisis center that counselled the victim.³² The court balanced the defendant's rights to confront witnesses and receive exculpatory material³³ with the victim's right to seek confidential counseling and, subsequently, denied the motion.³⁴ Critical to the court's decision was the fact that the defendant failed to demonstrate, by specific factual allegations, the relevance or materiality of the records and information he sought.³⁵ The defendant's failure to meet this burden was conclusive and caused the court to deny his motion without the necessity of an in camera inspection of the requested information.³⁶

It is submitted that CPLR 4510, through section 60.76 of the CPL³⁷, imposes unconstitutional burdens on an accused similar to those imposed in *Pena*. CPL section 60.76 requires that a defendant seeking disclosure of material privileged by CPLR 4510 support the request for this material with specific factual allega-

²⁹ 127 Misc. 2d 1057, 487 N.Y.S.2d 935 (Sup. Ct. Kings County 1985).

³⁰ *Id.* at 1061, 487 N.Y.S.2d at 939.

³¹ *Id.* at 1057, 487 N.Y.S.2d at 936.

³² *Id.*

³³ *Id.* at 1058, 487 N.Y.S.2d at 937. The right to receive exculpatory material, as the *Pena* court noted, is set forth in *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *Id.*

³⁴ 127 Misc. 2d at 1058, 487 N.Y.S.2d at 937. The court acknowledged the need to:

[B]alance defendant's . . . right of confrontation and cross-examination of an adverse witness, his right to exculpatory evidence and evidence material to the issue of guilt or innocence . . . and his right to statements made by prosecution witnesses . . . with the right of the complainant to seek counseling at rape crisis centers to aid her in dealing with the trauma of rape and her reasonable expectation that such counseling will not be made public.

Id. at 1058-59, 487 N.Y.S.2d at 937 (citations omitted).

³⁵ *Id.* at 1060, 487 N.Y.S.2d at 938. The court, in reaching this conclusion, relied on *People v. Gissendanner*, 48 N.Y.2d 543, 550, 399 N.E.2d 924, 928-29, 423 N.Y.S.2d 893, 898 (1979), which denied defendant Gissendanner's request for discovery of confidential police personnel records. The Court of Appeals balanced Gissendanner's right of confrontation against the state's interest in keeping the requested information confidential. *Id.* at 548, 399 N.E.2d at 927, 423 N.Y.S.2d at 896. The court concluded that defendant's rights were not strong enough to defeat those of the state absent a demonstrated theory of relevancy or materiality. *Id.* at 549-50, 399 N.E.2d at 928, 423 N.Y.S.2d at 897.

³⁶ *Pena*, 127 Misc. 2d at 1060, 487 N.Y.S.2d at 938.

³⁷ CPL § 60.76 (McKinney Supp. 1994)

tions.³⁸ This scheme, however, is seriously flawed because, without first seeing the requested material, a defendant cannot demonstrate a specific factual ground for revealing the contents of a file.³⁹ For this reason, New York courts should require a defendant to make only a preliminary showing that the counseling record *actually* contains relevant and exculpatory material.⁴⁰

In *Jenks v. United States*,⁴¹ the U.S. Supreme Court rejected the government's argument that a showing of inconsistencies between a witness' prior statements and trial testimony is a prerequisite for obtaining prior statements.⁴² The Court recognized the impossibility of such a requirement by finding that an accused cannot detect a conflict in testimony without first inspecting the witness' prior statements.⁴³ It is submitted that the rape counselor privilege, by imposing the impossible burden on a defendant

³⁸ *Id.*

³⁹ See *Pennsylvania v. Ritchie*, 480 U.S. 39, 67 (1987) (Brennan, J., dissenting) (arguing cross-examination is foreclosed by denying access to material that is basis of inquiry); *Alford v. United States*, 282 U.S. 687, 692 (1931) ("It is in the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop."); *United States v. Burr*, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694) (holding accused need only show that evidence may be relevant to case to require discovery). *But see United States v. Ehrlichman*, 389 F. Supp. 95, 97 (D.D.C. 1974) (denying request for privileged information because nonprivileged information was sufficient), *aff'd*, 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977); *Pena*, 127 Misc. 2d 1057, 1059, 487 N.Y.S.2d 935, 937 (Sup. Ct. Kings County 1987) (finding defendant's request for disclosure of rape counselor information to be "a desperate grasping at a straw" (quoting *Gissendanner*, 48 N.Y.2d at 550, 399 N.E.2d at 928, 423 N.Y.S.2d at 897 (1979))).

⁴⁰ *Gissendanner*, 48 N.Y.2d at 550, 399 N.E.2d at 929, 423 N.Y.S.2d at 897 (1979). However, in *Brady v. Maryland*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. 83, 87 (1963); see also *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (noting that some "plausible showing" must be made of how testimony is material and favorable to defense).

⁴¹ 353 U.S. 657 (1957).

⁴² *Id.* at 666. The Court reasoned that "[r]equiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense." *Id.* at 667.

⁴³ See *id.* The Court noted that "[f]lat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial . . . [is] also relevant to the cross-examining process of testing the credibility of a witness' trial testimony." *Id.* The Court further noted that "the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory." *Jenks*, 353 U.S. at 667.

of showing a specific factual ground prior to disclosure, ignores the Supreme Court's finding in *Jenks*.

In addition, it is submitted that CPL section 60.76 inadequately protects an accused's right to confront and cross-examine witnesses because it does not provide for the presence of defense counsel at an *in camera* review of rape counselor records.⁴⁴ To identify prior inconsistent statements, consent, or identity issues, defense counsel must review rape counseling records.⁴⁵ Indeed, defense counsel should be present at the review because a judge will not examine the records with an advocate's perspective.⁴⁶ Moreover, trial judges may not be equipped to decide whether statements or records will be useful to the defense.⁴⁷ CPL section 60.76 deprives the defendant of the opportunity to make this crucial determination. It is submitted, however, that although defendants should be allowed to examine counseling records, the examination should only extend to the declarations and notes that the complainant has approved as accurately reflecting what he or she has said.⁴⁸ This limitation should be implemented because it is unfair to impeach a witness based on a rape crisis counselor's interpretations of the witness' statements.⁴⁹

⁴⁴ See CPL § 60.76. See Weisberg, *supra* note 6, at 976-78. The author argues that "practicality, rather than any absolute right of a party, is the proper guideline for judges to follow in deciding who should attend the *in camera* hearing." *Id.* at 977-78. The author further notes that parties should be present only if the privileged communication makes it impractical for judges to analyze the evidence properly alone. *Id.* at 978; see *Alderman v. United States*, 394 U.S. 165 (1969) (holding counsel's presence at *in camera* review important in aiding judge's determination of relevant evidence in case).

⁴⁵ See *In re Pittsburgh Action Against Rape*, 428 A.2d 126, 132 (Pa. 1980). The defendant, accused of rape, asserted a defense of consent. *Id.* at 128. To support this defense counsel subpoenaed rape counselling records. *Id.* at 127. The trial court held the counselor in contempt when she refused to comply. *Id.*

⁴⁶ 428 A.2d at 132.

⁴⁷ *Id.*; *Commonwealth v. Hamm*, 378 A.2d 1219, 1226 (Pa. 1977) ("Matters contained in witness' statement may appear innocuous to some, but have great significance to [defense] counsel" (quoting *Commonwealth v. Grayson*, 353 A.2d 427, 429 (Pa. 1976))).

⁴⁸ *In re Pittsburgh Action Against Rape*, 428 A.2d at 132. Defendant should only be allowed to review notes that are "verbatim accounts of the complainant's declaration." *Id.*

⁴⁹ See *Commonwealth v. Hill*, 406 A.2d 796, 799 (Pa. Super. Ct. 1979) (observing unfairness of impeaching witnesses through use of police interpretation rather than witnesses' own recollections).

Although rape counselor privileges are necessary to encourage victims to seek help,⁵⁰ a defendant's right to cross-examine witnesses entails reviewing rape counseling records to facilitate the development of a sufficient line of inquiry.⁵¹ It is submitted that the courts should hold CPLR 4510 and CPL 60.76 unconstitutional and should, after a good-faith request,⁵² determine with defense counsel what statements are necessary for effective cross-examination. On the other hand, to protect rape victims, courts should limit disclosure to the victim's "verbatim"⁵³ statements, and should not allow disclosure of the counselor's interpretation of these statements. In doing so, New York courts would be protecting the constitutional rights of both the rape victim *and* the accused.

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⁵⁰ The legislative history of CPLR 4510 and CPL § 60.76 clearly demonstrates that encouraging victims to seek help is a primary purpose and benefit of these statutes. NEW YORK STATE EXECUTIVE DEPARTMENT DIVISION OF PROBATION AND CORRECTIONAL ALTERNATIVES, MEMORANDUM TO THE GOVERNOR, 1993, at 3. Indeed, "it is in the interest of the State of New York to encourage assistance to rape victims." NEW YORK BAR ASSOCIATION, MEMORANDUM TO THE GOVERNOR, 1993, at 1. The legislature sought to make rape counseling programs accessible to all victims by removing the fear of disclosure of sensitive information that "prevent[s] a victim from seeking help." NEW YORK STATE DIVISION FOR WOMEN, MEMORANDUM TO THE GOVERNOR, 1993, at 1.

⁵¹ See *supra* notes 17-21 and accompanying text.

⁵² See *People v. Pena*, 127 Misc. 2d 1057, 1059, 487 N.Y.S.2d 935, 936 (Sup. Ct. Kings County 1985) (finding against "fishing expedition" by defense counsel seeking privileged records).

⁵³ See *In re Pittsburgh Action Against Rape*, 428 A.2d 126, 132 (Pa. 1980); see *supra* text accompanying note 48.

